INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statutes involved	2
Statement	5
Argument	9
Conclusion	12

CITATIONS

Cases:

Blair v. *Commissioner*, 300 U. S. 5	11
Bull v. *United States*, 295 U. S. 247	10
Dobson v. *Commissioner*, 320 U. S. 489, rehearing denied, 321 U. S. 231	11
Hill v. *Commissioner*, 38 F. 2d 165	11
Pope v. *Commissioner*, 39 F. 2d 420	11
Veatch v. *Black*, 363 Mo. 190	10
Veatch v. *Commissioner*, decided November 30, 1953 (1953 P–H T. C. Memorandum Decisions, par. 53, 381)	8, 10
Wilkins v. *Commissioner*, 161 F. 2d 830	11

Statutes:

Internal Revenue Code:	
Sec. 22 (26 U. S. C. 1946 ed., Sec. 22)	2, 9
Sec. 126 (26 U. S. C. 1946 ed., Sec. 126)	3, 9
18 Vernon's Annotated Missouri Statutes (1952):	
Sec. 358.180	4
Sec. 358.250	4
Sec. 358.300	5
Sec. 358.310	5

305070—54

In the Supreme Court of the United States

OCTOBER TERM, 1954

No. 95

FAYE B. BLACK, ADMINISTRATRIX OF THE ESTATE OF ERNEST B. BLACK, DECEASED, PETITIONER

v.

HAROLD A. LOCKHART, COLLECTOR OF INTERNAL REVENUE, SIXTH DISTRICT OF MISSOURI

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court (R. 66–74) is not officially reported. The opinion of the Court of Appeals (R. 77–84) is reported at 209 F. 2d 308.

JURISDICTION

The judgment of the Court of Appeals was entered on January 28, 1954 (R. 84). A petition for rehearing, filed on February 10, 1954 (R. 85–88), was denied on February 25, 1954 (R. 89). The petition for a writ of certiorari was filed on

May 26, 1954. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254.

QUESTION PRESENTED

The taxpayer, as administratrix of the estate of her deceased husband, received certain payments from his former partner pursuant to their partnership agreement. In determining the proper treatment for income tax purposes of these payments, the question is whether they represented a distribution of partnership earnings on liquidation or the proceeds of sale of the deceased husband's interest in the partnership.

STATUTES INVOLVED

Internal Revenue Code:

> SEC. 22. GROSS INCOME.
>
> (a) *General Definition.*—"Gross income" includes gains, profits, and income derived from salaries, wages, or compensation for personal service * * * of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. * * *
>
> * * * * * *
>
> (26 U. S. C. 1946 ed., Sec. 22.)

SEC. 126 [as added by Sec. 134 (e), Revenue Act of 1942, c. 619, 56 Stat. 798]. INCOME IN RESPECT OF DECEDENTS.

(a) *Inclusion in Gross Income.*—

(1) *General rule.*—The amount of all items of gross income in respect of a decedent which are not properly includible in respect of the taxable period in which falls the date of his death or a prior period shall be included in the gross income, for the taxable year when received, of:

(A) the estate of the decedent, if the right to receive the amount is acquired by the decedent's estate from the decedent * * *.

* * * * *

(3) *Character of income determined by reference to decedent.*—The right, described in paragraph (1), to receive an amount shall be treated, in the hands of the estate of the decedent or any person who acquired such right by reason of the death of the decedent, or by bequest, devise, or inheritance from the decedent, as if it had been acquired by the estate or such person in the transaction by which the decedent acquired such right; and the amount includible in gross income under paragraph (1) * * * shall be considered in the hands of the estate or such person to have the character which it would have had in the hands of the decedent if the decedent had lived and received such amount.

* * * * *

(26 U. S. C. 1946 ed., Sec. 126.)

18 Vernon's Annotated Missouri Statutes (1952):

358.180. *Rules determining rights and duties of partners*

The rights and duties of the partners in relation to the partnership shall be determined, subject to any agreement between them, by the following rules:

* * * * *

(6) No partner is entitled to remuneration for acting in the partnership business, except that a surviving partner is entitled to reasonable compensation for his services in winding up the partnership affairs * * *.

* * * * *

358.250. *Nature of a partner's right in specific partnership property*

* * * * *

(4) On the death of a partner his right in specific partnership property vests in the surviving partner or partners, except where the deceased was the last surviving partner, when his right in such property vests in his legal representative. Such surviving partner or partners, or the legal representative of the last surviving partner, has no right to possess the partnership property for any but a partnership purpose.

* * * * *

358.300. *Partnership not terminated by dissolution*

On dissolution the partnership is not terminated but continues until the winding up of partnership affairs is completed (L. 1949, p. 506, § 30).

358.310. *Causes of dissolution*

Dissolution is caused:

* * * * *

(4) By the death of any partner;

(5) By the bankruptcy of any partner or the partnership;

* * * * *

STATEMENT

The taxpayer is the administratrix of the estate of her deceased husband, Ernest B. Black. Prior to his death on July 4, 1949, Mr. Black and N. T. Veatch, Jr., were associated as partners in Missouri, rendering professional services in the field of engineering. (R. 66–67.)

The partnership employed the completed contract method of accounting. Under that method, all receipts of fees and all payments of expenses incident to a particular job were accumulated until all of the work on that job was completed. (R. 67.) In this manner the exact profit or loss on each contract was determined for computing income at the time the contract was completed.

On January 1, 1937, the two partners had entered into a partnership agreement which contained, *inter alia,* provisions for handling partner-

ship affairs upon the death or retirement of one of the partners. The agreement contemplated that, upon the happening of such an event, an audit would be made of the business and that, generally speaking, the retiring partner or the estate of the deceased partner would share in the assets of the partnership on the basis of the value of his interest as disclosed by the books. The agreement provided that contracts uncompleted at the death of one of the partners would be carried to completion, any resulting profits being computed on the completed contract method, including subtraction of a salary for the surviving partner; that any new business undertaken by the surviving partner would be recorded in a separate set of books as his individual venture; that the old books would be continued intact until the assets had been realized, the liabilities paid, and the jobs in progress completed; that periodic accountings and payments would be made to the estate of the deceased partner, a final accounting and payment being made within thirty days after completion of the last contract uncompleted at the time of the deceased partner's death; that the estate of the deceased partner would be considered in equity as a vendor, having a lien on the assets of the partnership in the nature of a chattel mortgage or pledge to secure the payments due it; and that, in case of the death of the second partner, the balance due the estate of the first partner would become payable within sixty days,

in which event, until such payment, the partnership business would be operated under the joint control of the representatives of the two estates. (R. 4–12.)

A dispute having arisen between Veatch, the surviving partner, and the estate of Black, the deceased partner, as to the proper interpretation of the partnership agreement, Veatch instituted suit against the estate in the Circuit Court of Jackson County, Missouri, seeking a declaratory judgment construing the agreement (R. 19). That court found that the true intent or meaning of the provisions of the partnership agreement relating to the death of a partner was that the survivor should liquidate the partnership by completing contracts for services then in force, accounting to the estate of the deceased partner for that division of profits therefrom (one-half) to which the deceased partner would have been entitled if living (R. 64). Accordingly, the court rendered a judgment declaring that the partnership agreement provided for the liquidation of partnership affairs upon the death of one partner and not for the sale of an interest in the partnership by the estate of the deceased partner to the survivor (R. 66). On cross-appeals, this judgment was affirmed by the Supreme Court of Missouri (R. 19).

During the calendar year 1949, the firm of Black & Veatch completed a number of large contracts which were uncompleted at the time Black

died. In accordance with the partnership agreement, Veatch paid Black's estate $214,068.13 representing its share of the profits on these contracts. None of this sum was reported as income of the estate. (R. 17.) Taking the position that the entire sum was income of the estate,[1] the Commissioner of Internal Revenue, after allowing deductions for amounts distributed by the estate to beneficiaries, determined the taxable income of the estate to be $46,223.85, and assessed an income tax deficiency against it in the amount of $20,791.57, plus interest. Having paid the deficiency and having had her claim for refund disallowed, the taxpayer brought this suit for refund in the District Court. (R. 18–19.)

Pointing out that the surviving partner acquired nothing by reason of the payments to the deceased partner's estate, and that the surviving partner did not pay a certain, fixed amount but rather an amount based on the exact profits realized on each contract after deducting expenses, including his own salary (R. 72–73), the District

[1] In litigation involving the tax liability of the surviving partner, Veatch, (*Veatch* v. *Commissioner*, decided November 30, 1953 (1953 P–H T. C. Memorandum Decisions, par. 53,381)), the Commissioner, in order to protect the revenue, took a contrary position. In rendering a decision in favor of the taxpayer Veatch, the Tax Court also concluded (R. 83)—

"that under the partnership agreement of Black & Veatch it was the partners' intention that the partnership be liquidated upon the death of one partner, and they did not intend a sale as determined by respondent."

Court concluded that the payments to the deceased partner's estate represented, not the purchase price of his interest in the partnership, but rather a distribution of income realized on the performance of contracts held by the partnership prior to his death (R. 74). On appeal by the taxpayer, the Court of Appeals affirmed the District Court's judgment in favor of the Collector[2] (R. 77–84).

ARGUMENT

The sole issue presented is the proper construction of the partnership agreement here involved. Specifically, the question is whether, in dealing with the conduct of partnership affairs upon the death of one of two partners, the agreement provided for a distribution of partnership earnings on liquidation or for a sale of the deceased partner's interest to the surviving partner. The taxpayer does not contend that the payments which she received pursuant to the partnership agreement were not required to be included in the income of her deceased husband's estate under Sections 22 (a) and 126 (a) of the Internal Revenue Code, *supra,* pp. 2–3, if the agreement provided for a distribution of partnership earnings on liquidation. Rather, despite the conclu-

[2] In view of their agreement with the conclusions of the Supreme Court of Missouri, neither the District Court nor the Court of Appeals (nor the Tax Court) found it necessary to decide whether that court's determination that the partnership agreement did not provide for a sale was controlling (R. 74, 84).

sions of five courts to the contrary (the District Court (R. 74), the Eighth Circuit (R. 84), the Circuit Court of Jackson County, Missouri, in *Veatch* v. *Black,* (R. 64, 66), the Supreme Court of Missouri in *Veatch* v. *Black,* 363 Mo. 190, and the Tax Court in *Veatch* v. *Commissioner, supra*), the taxpayer merely contends (Pet. 16) that the agreement provided for a sale.

As the Supreme Court of Missouri in construing this agreement has pointed out (Pet., Appendix II), while certain of its expressions are indicative of a sale, the agreement as a whole clearly reveals that the parties intended to provide for liquidation of a deceased partner's interest in the business and a distribution of earnings from pending contracts. What the estate received was precisely the deceased partner's share of such earnings. The partnership had been engaged exclusively in the performance of personal services, and had had no capital. In the circumstances, the court below properly applied here the conclusion it quoted (R. 84) from *Bull* v. *United States,* 295 U. S. 247, 254, that the surviving partner "purchased nothing belonging to the decedent, who had made no investment in the business and owned no tangible property connected with it." Here, as in the *Bull* case, the payments by the surviving partner were clearly income to the deceased partner's estate.

The other cases with which the taxpayer apparently asserts a conflict (Pet. 2, 14) are not apposite.[3] Nor is there any merit in the taxpayer's suggestion (Pet. 23) that the Court of Appeals erred in relying upon the decision of the Supreme Court of Missouri; in view of their independent concurrence in that court's opinion, both the District Court and the Court of Appeals found it unnecessary to pass upon the Collector's contention that, because the partnership agreement was entered into and to be performed in Missouri, the state court's determination in a contested proceeding that such agreement did not provide for a sale should, under *Blair* v. *Commissioner,* 300 U. S. 5, be controlling.

[3] *Hill* v. *Commissioner*, 38 F. 2d 165 (C. A. 1st), and *Pope* v. *Commissioner*, 39 F. 2d 420 (C. A. 1st), involved insurance businesses which, unlike the engineering business here (R. 82–83), had substantial good will and other assets. In *Wilkins* v. *Commissioner*, 161 F. 2d 830, 831–832, the First Circuit merely concluded that under *Dobson* v. *Commissioner*, 320 U. S. 489, rehearing denied, 321 U. S. 231, it should not disturb the Tax Court's finding that the payment to which the deceased partner's estate was entitled was a sum certain, payable in any event, and having no aspects of a distributive share of partnership income.

CONCLUSION

The decision below is correct. The question is of no general importance. There is no conflict of decisions. The petition for a writ of certiorari should be denied.

Respectfully submitted.

SIMON E. SOBELOFF,
Solicitor General.
H. BRIAN HOLLAND,
Assistant Attorney General.
ELLIS N. SLACK,
A. F. PRESCOTT,
JOSEPH F. GOETTEN,
Special Assistants to the Attorney General.

JULY 1954.

U. S. GOVERNMENT PRINTING OFFICE: 1954